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Taking the Ninth: A Victim's Right of Privacy

Sarah Tupper*

In 2006, the Missouri Court of Appeals for the Eastern District issued a writ of habeas corpus in a case involving two women who had been held in contempt of court for refusing to testify against their grandfather in the prosecution of the grandfather for the alleged molestation of the women when they were minors.¹ The women refused to testify on the basis of their Ninth Amendment right of privacy and were jailed for contempt. The Eastern District ordered the women discharged, but did so without comment. The narrow issue raised in this Note is whether a person may “take the Ninth” and refuse to testify against a family member in a criminal proceeding based on a privacy right. The Ninth Amendment guarantees that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”² The broader question is whether a person should be able to assert a privacy right emanating from any source in order to refuse to testify against a family member.

Neither the United States Constitution nor the Bill of Rights explicitly mention a right to privacy.³ Yet the right to privacy is a hotly contested issue in both the state and federal courts.⁴ The United

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1. Because the women refused to testify, there was no evidence upon which the grandfather could be convicted, and the trial court entered a verdict of not guilty upon completion of the State's evidence. The record was then closed, and therefore there is no citation. See MO. REV. STAT. §§ 610.105, 610.120 (2006) for statutes governing the closing of records in Missouri.

2. U.S. CONST. amend. IX.

3. See *Roe v. Wade*, 410 U.S. 113, 152 (1973) (“The Constitution does not explicitly mention any right of privacy.”). Similarly, no explicit right to privacy exists in the Missouri Constitution. *Doe v. Phillips*, 194 S.W.3d 833, 843 (Mo. 2006).

4. For example, a Westlaw search of “right of privacy” in the “ALLCASES” database, which contains all state and federal cases, yielded over 21,830 results before returning with the

States Supreme Court has long recognized such a right as emanating from other specific guarantees in the Bill of Rights and from the structure of the United States Constitution itself.⁵ The Court has acknowledged a right to privacy in cases involving marriage,⁶ procreation,⁷ contraception,⁸ abortion,⁹ homosexuality,¹⁰ family relationships,¹¹ and child rearing and education.¹² Such a right has

generic result of “10000 Documents,” which is the highest number of results a search in Westlaw can produce. Westlaw, <http://www.westlaw.com> (last visited May 17, 2008).

5. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (“[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”). The penumbra concept in law embraces a body of rights held to be guaranteed by implication in a civil constitution. BLACK’S LAW DICTIONARY 1155 (7th ed. 1999). Some cases explicitly use this term while others allude to it. Compare *Griswold*, 381 U.S. at 484 (“specific guarantees in the Bill of Rights have penumbras”), with *Poe v. Ullman*, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting) (“[L]iberty’ is a conception that sometimes gains content from the emanations of other specific guarantees . . .”). The Constitution is structured to list certain enumerated rights, and the Ninth Amendment codifies the Framers’ intention that the list not be exclusive. See *infra* note 57.

6. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that miscegenation statutes adopted by Virginia to prevent marriages between persons of different races violated the Fourteenth Amendment’s guarantee of equal protection and due process); *Griswold*, 381 U.S. at 485–86 (holding that Connecticut law prohibiting married couple’s use of contraceptives unconstitutionally interferes with a “zone of privacy created by several fundamental constitutional guarantees.”).

7. *Carey v. Population Servs. Int’l*, 431 U.S. 678, 684 (1977) (recognizing one aspect of the “liberty” protected by the Due Process Clause of the Fourteenth Amendment is “‘a right of personal privacy, or a guarantee of certain areas or zones of privacy,’” (quoting *Roe*, 410 U.S. at 152), and that the decision whether or not to bear children is at the heart of this privacy right); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541–42 (1942) (holding forced sterilization of repeat criminals violates the Fourteenth Amendment guarantee of equal protection, as procreation is a fundamental civil right).

8. *Eisenstadt v. Baird*, 405 U.S. 438, 453–55 (1972) (holding that a Massachusetts statute prohibiting distribution of contraceptives to single persons to prevent pregnancy violates the equal protection clause of the Fourteenth Amendment “by providing dissimilar treatment for married and unmarried persons who are similarly situated”); *Griswold*, 381 U.S. at 485.

9. *Roe*, 410 U.S. at 164 (holding that a “criminal abortion statute of the [then]-current Texas type, that excepts from criminality only a life-saving procedure on behalf of the mother . . . is violative of the Due Process Clause of the Fourteenth Amendment.”).

10. *Lawrence v. Texas*, 539 U.S. 558, 578–89 (2003) (holding unconstitutional a Texas statute criminalizing homosexual sexual practices within privacy of home).

11. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (explaining that the “family itself is not beyond regulation in the public interest, as against a claim of religious liberty” or privacy).

12. *Pierce v. Soc’y of the Sisters*, 268 U.S. 510, 535 (1925) (holding that compulsory attendance at public schools violates the Fourteenth Amendment’s guarantee of liberty which protects parents’ rights to direct children’s upbringing); *Meyer v. Nebraska*, 262 U.S. 390, 403

been discovered as emanating from the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments, the structure of the Constitution, state constitutional provisions, and state victims' rights acts.¹³ The Missouri Supreme Court has likewise found that a right to privacy is fundamental and protected by substantive due process.¹⁴ Missouri follows the United States Supreme Court in its test for determining whether a right or liberty is "fundamental"¹⁵ and hence protected by due process requirements. In order to be fundamental, the right or liberty must be "objectively, deeply rooted in the nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."¹⁶

In Missouri, neither the constitutional provision covering crime victims' rights¹⁷ nor the victims' rights statute¹⁸ explicitly give a victim of a crime the right to refuse to testify against an accused. This issue is particularly important in situations where the victim is reluctant to testify against a family member due to the sensitive nature of family relationships, embarrassment, and community stigma. Given the history and tradition in both the nation generally and Missouri specifically, a victim who refuses to testify against a family member ought to be allowed in some circumstances to do so on the basis of an asserted fundamental right to privacy.

There are further complicating factors involved in the Missouri case cited at the beginning of this Note. The two women held in contempt for refusing to testify against their grandfather, as minors, had made statements to authorities regarding the alleged molestation.¹⁹ If they had taken the stand and renounced those previous statements, they could have been charged with perjury on the assumption that they were now lying to protect their

(1923) (striking down a Nebraska law prohibiting the teaching of foreign languages in schools as a violation of the Fourteenth Amendment).

13. U.S. CONST. amends. I, III, IV, V, IX, XIV. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

14. *Doe v. Phillips*, 194 S.W.3d 833, 843 (Mo. 2006).

15. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

16. *Phillips*, 194 S.W.3d at 842. *See also Palko*, 302 U.S. at 325.

17. MO. CONST. art. I, § 32.

18. MO. REV. STAT. § 595.209 (2006).

19. *See supra* note 1.

grandfather,²⁰ or charged with making false statements to the authorities in the first place. Missouri's witness immunity statute would not protect the women from these charges.²¹ That statute does not provide immunity from prosecution for perjury, false or misleading statements, or contempt, even when incriminating testimony is compelled.²² In other words, in this case the issue of asserting a right to privacy was particularly important, as the women would not have been able to avoid testifying against their grandfather by asserting a Fifth Amendment privilege against self-incrimination.²³

20. The perjury statute reads in pertinent part as follows:

1. A person commits the crime of perjury if, with the purpose to deceive, he knowingly testifies falsely to any material fact upon oath or affirmation legally administered, in any official proceeding before any court, public body, notary public or other officer authorized to administer oaths.
2. A fact is material, regardless of its admissibility under rules of evidence, if it could substantially affect, or did substantially affect, the course or outcome of the cause, matter or proceeding.

MO. REV. STAT. § 575.040 (2006).

21. MO. REV. STAT. § 491.205 (2006). *See infra* note 24.

22. *See infra* note 27. The Missouri Court of Appeals for the Eastern District issued a writ of prohibition to prevent a circuit court judge from compelling a daughter to testify against her father for allegedly molesting her as a child after the daughter had asserted her right against self-incrimination under both the United States Constitution and the Missouri Constitution. *Hill v. Kendrick*, 192 S.W.3d 719 (Mo. Ct. App. 2006). The writ was issued largely due to the State's failure to assure the court that the daughter's answers "could not possibly incriminate her," particularly in the absence of a grant of immunity. *Id.* at 720. Although the daughter claimed false declarations and reports among the potential offenses in which she might incriminate herself, which would not be protected by a grant of immunity, she also suggested that she might incriminate herself for statutory rape and for failure to report child abuse, which may not have been prosecutable after a grant of immunity. *Id.* at 721. *Hill* is thus not directly on point, but it is one of the very few cases which address the issue of an alleged victim refusing to testify against a family member.

23. A second complication involves Sixth Amendment issues. If an alleged victim makes out-of-court statements arguably incriminating the alleged abuser, but then refuses to testify, the defendant's Sixth Amendment right "to be confronted with the witnesses against him" is thereby implicated. U.S. CONST. amend. VI. If a right to privacy is asserted as a basis for refusing to testify against a family member, is the alleged victim then considered unavailable to testify, which in turn would allow her out-of-court statements to be introduced as evidence? If so, then the defendant's right to confront witnesses against him guaranteed by the Sixth Amendment is in jeopardy. There is a body of scholarship regarding issues involving witness "unavailability," out of court statements, hearsay, and the right of confrontation, but this issue is outside the scope of this Note. *See generally* Kurtis A. Kemper, Annotation, *When Is Witness "Unavailable" for Purposes of Admission of Evidence Under Rule 804 of Federal Rule of Evidence, Providing Hearsay Exception When Declarant Is Unavailable*, 174 A.L.R. FED 1

These types of cases present three significant questions. First, is there is a fundamental right of privacy protected by either state or federal law? Second, if so, what is its source? Third, does it allow a victim to refuse to testify against a family member? Although the first two questions are central to the third and will be discussed, this Note centers on the third question: whether there is a right to refuse to testify against a family member based on a Ninth Amendment right to privacy.

In Missouri, there should be a right to refuse to testify against a family member under certain circumstances. In the case described above, the court held two alleged victims in contempt of court, and they went to jail. Had there not been intervention by the Court of Appeals, Missouri law would have allowed the women to remain in jail until the end of trial, for up to one year.²⁴ The policy considerations implicated by imprisoning the very people the state is trying to protect are enormous: it is bad policy to jail alleged victims. Although there is admittedly a tension between victims' rights and the state and public's interest in bringing perpetrators to justice, the complex issues involved in the family dynamic compel the conclusion that in certain cases, the victims' right to privacy must outweigh the state's interests. Family unity, protecting the rights of victims, and the negative repercussions that would otherwise result are among the reasons to allow victims to make choices about whether or not to testify against a family member. Moreover, the concept of privacy is within the scope of Missouri and federal law,

(2001). This annotation predates the landmark decisions in *Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, 547 U.S. 813 (2006), which changed the landscape of Sixth Amendment jurisprudence. However, the discussion of "availability" in Kemper's annotation largely survived this sea change.

24. The witness immunity statute provides:

If a person refuses to testify on the basis of such person's privilege against self-incrimination after being given an order to testify under this section or produce evidence or other information, such person shall be adjudged in contempt and committed to the county jail until such time as the person purges himself or herself of this contempt by testifying or producing evidence and information as ordered, or the trial for which the person's testimony was requested has concluded. In no event shall the length of confinement exceed twelve months.

MO. REV. STAT. § 491.205(3).

and it can and should provide an adequate basis for asserting a right to refuse to testify against a family member.

Part I of this Note canvasses the historical development of privacy jurisprudence, setting the framework for the discussion of privacy as a fundamental right. This includes the federal and state constitutional bases for privacy rights, as well as the interplay of victims' right statutes, rape shield laws, witness immunity laws, privileges and constitutional provisions. Part II analyzes the issues introduced in Part I, and argues that in Missouri, a victim should have the right to refuse to testify against a family member under certain identified conditions, based on an asserted right to privacy. Part III concludes that the Ninth Amendment can provide a basis for this qualified right, and should not be overlooked by legal scholars and practitioners.

I. HISTORY AND DEVELOPMENT OF PRIVACY LAW

A. *Historical Notions of Privacy*

The right to privacy has deep roots in American jurisprudence, and emanates from tort, property, and contract law. One commentator, R. T. Kimbrough, has stated that, although the underpinnings of privacy rights have a lengthy ancestry,

[I]t was not until the publication in 1890 of the article by Warren and Brandeis . . . that the right was introduced and defined as an independent right and the distinctive principles upon which it is based were formulated. The writer can think of no other instance in Anglo-American law in which a whole category of legal rights has been synthesized at one stroke, as was the case with the right of privacy. The article by Warren and Brandeis "enjoys the unique distinction of having initiated and theoretically outlined a new field of jurisprudence."²⁵

There have been many definitions and characterizations of a right of privacy. It includes the right to be "let alone";²⁶ to be free from

25. R.T. Kimbrough, Annotation, *Right of Privacy*, 138 A.L.R. 22, 25 (1942) (citing Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)) (quoting Basil W. Kacedan, *The Right of Privacy*, 12 COLUM. L. REV. 693 (1932)).

26. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)

unwarranted and undesired publicity;²⁷ to live one's life in seclusion;²⁸ and to live without unwarranted interference by the public about matters with which the public is not necessarily concerned.²⁹

The right to privacy has been described as “the absolute right of every person not to be interfered with to his distress, discomfort, or damage. Every person has the right to demand that his private, personal affairs should not be commented upon or scrutinized in public without his consent.”³⁰

B. Federal and State Right to Privacy

Due process provides heightened protection against governmental interference with rights and liberties identified as fundamental, such as the rights to marry,³¹ have children,³² direct the education and upbringing of one's children,³³ marital privacy,³⁴ contraception,³⁵ bodily integrity,³⁶ and abortion.³⁷ Many of these areas have explicitly been identified as fundamental because they are within a “zone of

(dissenting from the Court's holding that the use in criminal trial of evidence of private phone conversations between defendants and others, obtained by means of wire tapping, does not violate the Fourth or Fifth Amendments), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967).

27. *Banks v. King Features Syndicate*, 30 F. Supp. 352, 353–54 (S.D.N.Y. 1939) (identifying potential privacy right in X-ray images of plaintiff's pelvic region); *Jones v. Herald Post Co.*, 18 S.W.2d 972, 973 (Ky. 1929) (holding that publication of photograph in connection with incorrect quotation of plaintiff was not invasion of right or privacy, as there are times when one “becomes [sic] an actor in an occurrence of public or general interest” such that one no longer has a protected privacy interest).

28. *Billings v. Atkinson*, 489 S.W.2d 858, 859 (Tex. 1973) (holding that installation of wiretap device on petitioner's telephone was an actionable invasion of right of privacy).

29. *Brents v. Morgan*, 299 S.W. 967, 971 (Ky. 1927) (holding that right to privacy was implicated when the defendant posted a large sign detailing the plaintiff's failure to pay a delinquent account).

30. Kimbrough, *supra* note 25 (citing Kacedan, *supra* note 25, at 353).

31. *Loving v. Virginia*, 388 U.S. 1 (1967).

32. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

33. *Pierce v. Soc'y of the Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

34. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

35. *Id.*; *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

36. *Rochin v. California*, 342 U.S. 165 (1952).

37. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992).

privacy.”³⁸ One area identified in various jurisdictions as being within the realm of privacy is the family and home, although that privacy must yield when it seriously interferes “with the health, safety, rights and privileges of others, or with the public welfare.”³⁹ Even when such interference exists, privacy cannot be invaded “absent a persuasive showing of a close and substantial relationship of the intrusion to a legitimate governmental interest.”⁴⁰ An expectation of family privacy is required before a right of family privacy attaches.⁴¹ The right of privacy is usually concerned with a protected relationship, not with any particular place.⁴² No state currently has any constitutional or statutory provision granting a right to *refuse* to testify based on a right to privacy, although a handful of states allow victims the right to refuse any interviews, discovery requests, or other pre-trial contact with defendants or defendants’ agents.⁴³

38. The first time the United States Supreme Court used the phrase “zone of privacy” was in *Griswold v. Connecticut*, at the same time the penumbra concept was introduced to privacy jurisprudence. 381 U.S. 479, 484 (1965). See *supra* note 5.

39. 16B C.J.S. *Constitutional Law* § 1017 (2006) (citing *Ravin v. State*, 537 P.2d 494 (Alaska 1975)).

40. *Id.* For instance, in *Ravin v. State*, the Alaska Supreme Court held that possession of marijuana by adults at home for personal use is constitutionally protected because there is no persuasive justification for the governmental intrusion into a citizen’s right of privacy. *Ravin*, 537 P.2d at 504.

41. C.J.S. *Constitutional Law*, *supra* note 39, at § 1017 (citing *Drummond v. Fulton County Dep’t. of Family and Children Servs.*, 228 S.E.2d 839 (Ga. 1976)). In *Drummond*, the Georgia Supreme Court explained that since foster parents have no right to keep a foster child, they can have no expectation of family privacy, and thus cannot base a due process claim on a right of family privacy. 228 S.E.2d at 843.

42. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 n.13 (1973). *But cf.* *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (holding that a state may not intrude into a home for purposes of regulating the mere possession of obscene materials). In *Paris Adult Theatre I*, the Supreme Court distinguished the privacy right articulated in *Stanley* (namely, the right to possess pornography in the home) as being restricted to the home, whereas “the constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just concerned with a particular place, but with a protected intimate relationship.” 413 U.S. at 66 n.13.

43. ARIZ. REV. STAT. ANN. § 13-4433 (2006) (“[T]he victim shall not be compelled to submit to an interview on any matter . . . that is conducted by the defendant, the defendant’s attorney or an agent of the defendant.”); IDAHO CONST. art. I, § 22 (stating that crime victim has right “[t]o refuse an interview, ex parte contact, or other request by the defendant, or any other person acting on behalf of the defendant, unless such request is authorized by law.”); LA. CONST. art. I, § 25 (stating that victim has “the right to refuse to be interviewed by the accused

The United States Constitution contains several amendments that implicitly encompass privacy rights.⁴⁴ The First Amendment sets out individuals' rights of free expression, as such expression relates to religion, speech, press, or assembly.⁴⁵ Interpreting the First Amendment, the Supreme Court found it to contain the freedom of association as well as privacy within that association.⁴⁶ The prohibition against the quartering of soldiers without homeowners' consent is a type of privacy recognized by the Third Amendment.⁴⁷ The Fourth Amendment provides a right of persons to be protected from unreasonable searches and seizures of their persons, houses, papers, and effects: an explicit affirmation of a zone of privacy.⁴⁸ It protects both the person and the home, and the privacy interests therein. The Fifth Amendment provides a privilege against self-incrimination, as well as protection from deprivation of life, liberty or property without due process of law.⁴⁹ The privacy interest in not disclosing one's own guilt, and the privacy interest in one's life,

or a representative of the accused"); OR. CONST. art. I, § 42 (stating that victims' rights include "[t]he right to refuse an interview, deposition or other discovery request by the criminal defendant or other person acting on behalf of the criminal defendant."). For a helpful compilation of victims' rights laws, see About.com, Crime Victims' Rights by State, http://crime.about.com/od/victimrightsbystate/Crime_Victims_Rights_by_State.htm (last visited Oct. 14, 2008).

44. U.S. CONST. amends. I, III, IV, V, IX, XIV; *Griswold v. Connecticut*, 381 U.S. 479, 481, 484–85 (1965).

45. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . .").

46. *Griswold*, 381 U.S. at 483; *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958).

47. U.S. CONST. amend. III ("No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."); *Griswold*, 381 U.S. at 484.

48. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."); *Mapp v. Ohio*, 367 U.S. 643, 656 (1961). Additionally, the Supreme Court, in an opinion by Justice White, wrote that "[t]he basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Mun. Court*, 387 U.S. 523, 528 (1967).

49. U.S. CONST. amend. V ("[N]or shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."); *Boyd v. United States*, 116 U.S. 616, 630 (1886) (noting that the Fourth and Fifth Amendments protect the "privacies of life"), *overruled on other grounds by* *Warden v. Hayden*, 387 U.S. 294 (1967).

liberty or property is protected by these provisions.⁵⁰ The Supreme Court has recognized privacy to be within one's liberty interests on many occasions.⁵¹

The Ninth Amendment reserves unenumerated rights for the people. The essence of the Amendment is that the absence of explicit mention of a right in the Constitution should not signal that such a right does not exist.⁵² The Ninth Amendment has been controversial since its proposal; because it grants no positive right, courts and scholars have struggled to define its scope, leaving it wallowing in legal obscurity.⁵³ However, the Ninth Amendment was intended to reassure those Framers nervous about the ratification of the Bill of Rights that just because certain rights were enumerated did not mean that others did not exist.⁵⁴ They did exist, the Framers insisted, and they were retained by the people.⁵⁵

50. The Fourth and Fifth Amendments are often considered together as protection against all governmental intrusions into "the sanctity of a man's home and the privacies of life." *Boyd*, 116 U.S. at 630. See also *Griswold*, 381 U.S. at 485 (referring to these "penumbral rights of privacy and repose") (internal quotations omitted).

51. *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977); *Roe v. Wade*, 410 U.S. 113, 153 (1973) ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."); *Paris Adult Theatre I. v. Slaton*, 413 U.S. 49, 65 (1973); *Griswold*, 381 U.S. at 486; *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

52. U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); *Griswold*, 381 U.S. 486–99 (1965) (Goldberg, J., concurring) (describing language and history of Ninth Amendment and illustrating Framers' debate over the wisdom of adopting a Bill of Rights).

53. See *infra* notes 80–81.

54. James Madison, the drafter of the Ninth Amendment, acknowledged the danger inherent in enumerating certain rights, namely, that "exceptions to powers which [were] not granted . . . would afford a colorable pretext to claim more than were granted," THE FEDERALIST NO. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961). He responded to these concerns in the following way:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the last clause of the fourth resolution.

I ANNALS OF CONGRESS 439 (Gales & Seaton ed., 1834). The "last clause of the fourth resolution" was an early draft of the Ninth Amendment, the text of which was:

The Fourteenth Amendment, in addition to extending the protections guaranteed by the United States Constitution to state action, also contains a Due Process Clause and an Equal Protection Clause.⁵⁶ The Due Process Clause of the Fourteenth Amendment applies the Fifth Amendment protection against deprivation of life, liberty, or property to acts of the states.⁵⁷ A right to privacy has been found to be a liberty interest substantively protected by this clause.⁵⁸ The Equal Protection Clause of the Fourteenth Amendment⁵⁹ ensures that, where one person has a privacy right, so too do all persons. This Clause is cited in cases involving homosexual conduct⁶⁰ for the argument that where heterosexual couples have a right to privacy in their consensual sexual behavior, so too do homosexual couples.⁶¹

Missouri's Constitution contains provisions which parallel the Federal Constitution's First, Fourth, Fifth, Ninth and Fourteenth Amendments.⁶² Additionally, the Missouri Constitution contains a

The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.

Id. at 435.

55. U.S. CONST. amend. IX. *See infra* notes 81 and 84 and accompanying text.

56. U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."); *Doe v. Phillips*, 194 S.W.3d 833, 843 (Mo. 2006) ("[V]iolations of . . . rights not specifically set out in the constitution but inherent in the concept of ordered liberty are analyzed under substantive due process principles.").

57. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . .").

58. *Lawrence v. Texas*, 539 U.S. 558, 564 (2003); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

59. U.S. CONST. amend. XIV, § 1 ("[N]or deny to any person within its jurisdiction the equal protection of the laws."); *Lawrence*, 539 U.S. at 574–75.

60. *Bowers v. Hardwick*, 478 U.S. 186, 202–03 (1986) (Blackmun, J., dissenting) (criticizing majority's refusal to consider the Equal Protection Clause); *Lawrence*, 539 U.S. at 574–75 (discussing validity of Equal Protection Clause challenge to statute, but concluding that the Due Process Clause argument needed to be addressed in order to overrule *Bowers*).

61. *Bowers*, 478 U.S. at 202–03 (Blackmun, J., dissenting).

62. Article I, section 2 of the Missouri Constitution provides:

That all constitutional government is intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these

crime victims' rights section in its Bill of Rights.⁶³ Other states have explicitly included a right of privacy in their constitutions.⁶⁴

things is the principal office of government, and that when government does not confer this security, it fails in its chief design.

MO. CONST. art. I, § 2. *Compare id. with* U.S. CONST. amends. V and XIV, § 1. Article I, section 5 of the Missouri Constitution provides:

That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no human authority can control or interfere with the rights of conscience; that no person shall, on account of his religious persuasion or belief, be rendered ineligible to any public office or trust or profit in this state, be disqualified from testifying or serving as a juror, or be molested in his person or estate; but this section shall not be construed to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace or safety of the state, or with the rights of others.

MO. CONST. art. I, § 5. *Compare id. with* U.S. CONST. amend. I. Article I, section 8 of the Missouri Constitution provides "[t]hat no law shall be passed impairing the freedom of speech, no matter by what means communicated: that every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject, being responsible for all abuses of that liberty." MO. CONST. art. I, § 8. *Compare id. with* U.S. CONST. amend. I. Article I, section 9 of the Missouri Constitution provides, "[t]hat the people have the right peaceably to assemble for their common good." MO. CONST. art. I, § 9. *Compare id. with* U.S. CONST. amend. I. Article I, section 10 of the Missouri Constitution provides, "[t]hat no person shall be deprived of life, liberty or property without due process of law." MO. CONST. art. I, § 10. *Compare id. with* U.S. CONST. amends. V and XIV, § 1. Article I, section 15 provides:

That the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by written oath or affirmation.

MO. CONST. art. I § 15. *Compare id. with* U.S. CONST. amend. IV. Article I, section 19 of the Missouri Constitution provides, "[t]hat no person shall be compelled to testify against himself in a criminal cause." MO. CONST. art. I, § 19. *Compare id. with* U.S. CONST. amend. V.

63. MO. CONST. art. I, § 32. The provision provides crime victims the rights: to be present at all criminal justice proceedings at which the defendant has such right; to be informed of and heard at guilty pleas, bail hearings, sentencing, probation revocation hearings, and parole hearings; to be informed of trials and preliminary hearings; to restitution; to speedy disposition and appellate review; to reasonable protection from the defendant or defendant's agents; to information concerning the escape, release, and scheduling of defendant's release from incarceration; and to information about how the criminal justice system works, the right to and availability of services, and the nature of the crime. *Id.*

64. *See, e.g.,* ALASKA CONST. art. I, § 22 ("The right of the people to privacy is recognized and shall not be infringed."); CAL. CONST. art. I, § 1 ("Among these [inalienable rights] are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."). However, no state has granted victims an explicit right to refuse to testify, though a few have provided victims the right to refuse discovery requests by the accused. *See, e.g.,* ARIZ. CONST. art. II, § 2.1 ("[A]

C. Other Laws

The Missouri Victims' Rights Act, codified in Chapter 595 of Missouri's Revised Statutes, grants various rights to victims and witnesses.⁶⁵ Such rights are afforded to victims of dangerous felonies, such as murder in the first degree, voluntary manslaughter, and any attempt to commit any of these.⁶⁶ In addition, upon written request, the rights are afforded to victims and witnesses of all other crimes.⁶⁷ Chapter 595 concludes by noting that the "rights of the victims

victim of crime has a right . . . [t]o refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant."). Many states, in fact, have included an affirmative duty to cooperate with the prosecution, or to report the crime, and at least one state *requires* victims to testify at trial. 725 ILL. COMP. STAT. 120/7 (2006) ("Victims and witnesses shall have the following responsibilities to aid in the prosecution of violent crime. (a) To make a timely report of the violent crime; (b) To cooperate with law enforcement authorities throughout the investigation, prosecution, and trial; (c) to testify at trial . . ."). State cases are conflicted on interpretations of testimony requirements. Compare *State ex rel. Dean v. City Court of Tucson*, 844 P.2d 1165, 1166 (Ariz. 1992) (finding that Victims' Rights Implementation Act "does not give the victim the absolute right not to testify at court proceedings."), with *State v. Boodry*, 394 P.2d 196, 200 (Ariz. 1964) ("There is no constitutional requirement that the victim of any crime testify. . . . The right of confrontation conferred by [Arizona's Constitution] is a right to confront witnesses not victims."). An Arizona appellate court interpreted *Dean*, in a case where the defendant conceded guilt but challenged the seriousness of the crime during sentencing, as allowing compulsion of a victim to give testimony at a presentence hearing. *Weiss v. Superior Court*, 911 P.2d 633 (Ariz. Ct. App. 1996).

65. MO. REV. STAT. § 595.209 (2006).

66. *Id.* § 1.

67. *Id.* For victims, such rights include: the right to be present at all criminal justice proceedings at which the defendant has such right; to information about the crime; to be informed about changes to the docket; to confer with and be informed by the prosecutor regarding hearings, pleas, sentencing, etc., and to be heard at such hearings; to be informed of the status of the case, the availability of victims' services, any release of the accused, or any escape of the accused; to be informed of similar occasions involving juvenile perpetrators of probation revocation hearings in juvenile cases; to be informed of the projected date of release from confinement, any release on bond, any release for other reasons, any scheduled parole or release hearings, any escape and subsequent recapture, any commutation or pardon of sentence, and the death of accused; to reasonable protection from defendant or defendant's agents; to be informed of the right to restitution; to be informed of the procedures to be followed in order to apply for and receive any witness fee to which they are entitled; to have returned their property when no longer needed for evidentiary reasons; to be provided with creditor intercession services if unable to temporarily meet financial obligations as a result of the crime; to speedy disposition of their cases, and speedy appellate review; to be provided a secure waiting area during court proceedings; and to receive notification of any hearing conducted for reconsideration of sentence imposed. *Id.* Cf. MO. CONST. art. I, § 32.

granted in this section are absolute and the policy of this state is that the victim's rights are paramount to the defendant's rights."⁶⁸

Missouri's witness immunity law eliminates a witness's ability to assert a self-incrimination privilege.⁶⁹ It states that a witness may not refuse to testify on the basis of the witness's privilege against self-incrimination once immunity has been granted.⁷⁰ Immunity is freedom from criminal prosecution or penalty, except that it does not prevent prosecution for perjury, giving a false or misleading statement, or contempt committed in answering or failing to answer.⁷¹ The statute goes on to say that, should a person continue to refuse to testify after being given an order to testify, such person will be found in contempt, and jailed until she testifies, or until the trial concludes, but not longer than twelve months.⁷²

Missouri also has what is commonly referred to as a "rape shield law."⁷³ This law protects prosecuting witnesses from interrogation

68. MO. REV. STAT. § 595.209 (5) (2006).

69. *Id.* § 491.205. See also *supra* note 24 and accompanying text.

70. § 491.205(1).

71. The statute reads in full as follows:

In the case of an individual who has been or may be called to testify or provide other information . . . the judge . . . may issue . . . upon the written request of the prosecuting attorney an order requiring such individual to give testimony or provide other information which the individual refuses to give or provide on the basis of the individual's privilege against self-incrimination. When such an order is issued, the witness may not refuse to comply with the order on the basis of the witness's privilege against self-incrimination, but after complying with the order and giving the testimony or producing the evidence compelled by the order, no such person shall be criminally prosecuted or subjected to any criminal penalty for or on account of any act, transaction, matter or thing which is the subject matter of the inquiry in which the person testifies or produces evidence, *except a prosecution for perjury, giving a false or misleading statement or contempt committed in answering or failing to answer, or in producing or failing to produce evidence in accordance with the order.*

Id. (emphasis added). See *supra* note 20 for Missouri's perjury statute, MO. REV. STAT. § 575.040 (2006).

72. MO. REV. STAT. § 491.205(3). See *supra* note 24. At least one state has expressly disallowed imprisonment for victims of sexual assault. CAL. CIV. PRO. § 1219(b) (2007) ("[N]o court may imprison or otherwise confine or place in custody the victim of a sexual assault for contempt when the contempt consists of refusing to testify concerning that sexual assault."). However, a victim of domestic violence who refuses to testify must spend seventy-two hours in a domestic violence counseling program, or perform seventy-two hours of community service. *Id.* § 1219(c).

73. MO. REV. STAT. § 491.015 (2006).

regarding prior sexual conduct.⁷⁴ It reflects a concern with putting rape victims on trial by calling into question their past sexual behavior.⁷⁵

II. ANALYSIS AND PROPOSAL

Although this Note identifies each of the potential bases for a right to privacy in order to show that such a right does indeed exist, the Note's focus is on the Ninth Amendment for two reasons.⁷⁶ First, because the Ninth Amendment is one of the most controversial amendments due to its scope and indeterminacy,⁷⁷ it is often overlooked in constitutional jurisprudence as providing an independent basis for a holding.⁷⁸ This judicial "ignoring"⁷⁹ is

74. *Id.*

75. Many commentators have pointed out that without the protection of such a shielding statute, outdated and sexist notions of women "asking for" sexual contact by dressing provocatively or behaving promiscuously, which in turn "cause" men to rape them, will continue. *See, e.g.,* Euphemia B. Warren, *She's Gotta Have It Now: A Qualified Rape Crisis Counselor-Victim Privilege*, 17 *CARDOZO L. REV.* 141, 144 (1995); Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior*, 44 *CATH. U. L. REV.* 709, 711 (1995). Although not especially relevant to the issues explored in this Note, rape shield laws in other contexts may interact with privacy rights.

76. Another reason to address the Ninth Amendment is because it is the Amendment relied on by the women in the case described above that prompted this Note. *See supra* note 1 and accompanying text.

77. "In sophisticated legal circles mentioning the Ninth Amendment is a surefire way to get a laugh." JOHN H. ELY, *DEMOCRACY AND DISTRUST* 34 (1980). This author's personal experience confirms this truism.

78. Chase J. Sanders, *Ninth Life: An Interpretive Theory of the Ninth Amendment*, 69 *IND. L.J.* 759, 761 (1994) (exploring the history of and reasons behind the neglect of the Ninth Amendment). *See also* *Griswold v. Connecticut*, 381 U.S. 479, 490–91 (1965) (Goldberg, J., concurring) ("While this Court has had little occasion to interpret the Ninth Amendment, it cannot be presumed that any clause in the constitution is intended to be without effect.") (citation omitted).

79. Prior to 1965, the Supreme Court had mentioned the Ninth Amendment in fewer than ten cases. *See* *Livingston's Lessee v. Moore*, 32 U.S. (7 Pet.) 469, 551 (1833); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 511 (1857) (Campbell, J., concurring); *Ashwander v. TVA*, 297 U.S. 288, 330–31 (1936); *Tenn. Elec. Power Co. v. TVA*, 306 U.S. 118, 143–44 (1939); *United Pub. Workers v. Mitchell*, 330 U.S. 75, 94–95 (1947); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948); *Roth v. United States*, 354 U.S. 476, 492 (1957). In 1965, the Court decided *Griswold v. Connecticut*, which was striking not only because of the majority's explicit recognition of a penumbral right of "privacy and repose," 381 U.S. at 485, but also because of Justice Goldberg's remarkable concurrence in which he explored the Ninth Amendment's

puzzling and plays a special role in the area of privacy law.⁸⁰ Second, the interplay between the Ninth Amendment and privacy suggests that privacy concepts may have as much bearing on how to interpret the Ninth Amendment as the Ninth Amendment has on how to interpret the right of privacy.⁸¹

A. Analysis

A victim's refusal to testify most typically arises in three situations: (1) domestic violence cases; (2) crimes (often rape or other

history in detail, and breathed new life into the Amendment. 381 U.S. at 486–99 (Goldberg, J., concurring).

80. Sanders, *supra* note 81, at 761–62 (exploring how the Court manipulates the Ninth Amendment to produce inconsistent results in privacy cases because of the Amendment's malleability).

81. Sanders notes that:

There seems to be but one simple reason underlying the Ninth Amendment's neglect: it appears incapable of practical interpretation. No one has yet discovered a mechanism for empowering courts to identify the "other[] [rights] retained by the people" that does not dramatically swell the judiciary's head on the three-headed hydra of American government.

Sanders, *supra* note 81, at 761. Similarly, privacy, when addressed through amendments other than the Ninth, is treated as a particularly troublesome expansion of the concept of "fundamental" rights. In *Bowers v. Hardwick*, the Supreme Court refused to acknowledge a fundamental right "to engage in homosexual sodomy," citing a distaste for expanding the Due Process Clauses of the Fifth and Fourteenth Amendments beyond processes by which life, liberty, or property is taken. 478 U.S. 186, 191 (1986). The Court said, "[a]mong such cases are those recognizing rights that have little or no textual support in the constitutional language." *Id.* Ninth Amendment rights are unenumerated, and as such, do not provide the "constitutional language" the Court was seeking. But the reason the Ninth Amendment was included in the Bill of Rights in the first place was to ensure that the Justices did not limit the people's rights to what was explicit in the "constitutional language." See James Wilson's speech at the Constitutional Convention:

[I]n a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but, in my humble judgment, highly imprudent. . . . If we attempt an enumeration, every thing that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.

THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1789 (Jonathon Elliot ed., 2d ed. 1836). This is a perfect example of the dangers of the legal principle "inclusio unius est exclusio alterius" ("the inclusion of one is the exclusion of another"). For an extremely thorough and detailed description of the history surrounding the ratification of the Bill of Rights and the role of the Ninth Amendment, see Sanders, *supra* note 81, at 763–73.

sexual misconduct) alleged against nonfamily members; and (3) where refusal to testify against a family member is based on a testimonial privilege (and the refuser is not the victim). There is little law or commentary directly on point regarding a *victim's* privacy right in refusing to testify against a non-spouse family member, and so this analysis must extrapolate from three more typical situations, from public policy, and from the limits of what existing law can support.

1. Domestic Violence

A vast quantity of commentary addressing compelled testimony in domestic violence situations exists.⁸² Although it may seem counterintuitive at first glance, many advocates for victims of domestic violence favor compelled testimony, although they may differ on the acceptable consequences for refusing to testify.⁸³ Valid concerns support these advocates' positions, and are relevant to the topic of this Note. Specifically, these advocates are concerned about continued abuse resulting from coercion by the alleged abuser or the alleged victim's family, or about the victim's fear even absent express threats or coercion.⁸⁴ Where testimony is compelled, victims of domestic violence who would otherwise be reluctant to testify can point to the law and the courts as the source of the alleged abuser's problems. The blame is thereby removed from the victim and placed on the state, which reduces potential retaliation and in turn encourages victims to testify.⁸⁵ Even where abuse is not likely to

82. For example, a Google search of the rather specific "'domestic violence' 'compelled testimony'" yielded 576 hits, ranging from bar websites, blogs, online journals, and state and court websites, to name a few. See Google.com, <http://www.google.com/search?hl=en&q=%E2%80%9Cdomestic+violence%22+%22compelled+testimony%22> (last visited July 3, 2008).

83. Compare Renee L. Rold, *All States Should Adopt Spousal Privilege Exception Statutes*, 55 J. MO. BAR NO. 5 249, 253 (1999) (advocating for contempt rulings against victims of domestic violence who refuse to testify, with community service and counseling, and possibly jail time, for refusal), with Sherry F. Colb, *Helping Battered Women Without Holding Them in Contempt*, FINDLAW, Sept. 25, 2002, <http://writ.news.findlaw.com/colb/20020925.html> (suggesting an alternative to findings of contempt; namely, a hearsay exception to victims' statements to police).

84. Rold, *supra* note 86, at 249.

85. *Id.* at 251. Rold argues that abusers are less likely to retaliate against the victim for

occur again, or where the victim has made the decision not to testify absent fear or coercion, many domestic violence commentators still promote compelled testimony based on the idea that domestic violence is violence against all women and society as a whole, rather than against any particular individual.⁸⁶ Any past abuser who remains unpunished, under this theory, causes continual harm against society and represents an affront to the criminal justice system.⁸⁷

This theory is the most sharply criticized by commentators opposed to compelled testimony in domestic violence cases.⁸⁸ One commentator, herself a survivor of domestic violence, writes passionately that domestic violence “is a crime committed by one individual against another. The way to empower victims is to restore and respect their choices, not to coerce them further.”⁸⁹ These critics’ concerns reflect the danger in protecting an abstract notion of society or women generally, at the expense of the actual victims.⁹⁰

Domestic violence provides some helpful parallels to the issue presented by this Note, such as the concerns regarding continued abuse and coercion by the abuser or by the victim’s family. However, there are important distinctions as well. In domestic violence situations, the abuser and the victim often live under the same roof, magnifying concerns about abuse and coercion, whereas there are

testifying if testimony is compelled. *Id.* at 253.

86. “If domestic violence is not combated, the cycle of violence will perpetuate itself through generations to come, leading to enormous economic demands on society.” *Id.* at 253.

87. “After all, criminal assault violates the laws of the state and should not be considered a private affair to be addressed or not, depending on a private party’s wishes.” Colb, *supra* note 86.

88. See, e.g., Wendy McElroy, *Don’t Jail Domestic Violence Victims*, INDEPENDENT INSTITUTE, Dec. 14, 2005, <http://www.independent.org/newsroom/article.asp?id=1638>.

89. *Id.* McElroy criticizes states that require court ordered counseling to domestic violence victims reluctant to testify. She implies that during such counseling, victims are warned that they may be imprisoned if they refuse to testify. She further argues that this counseling constitutes “earlier and more subtle forms of coercing testimony,” and this insidious practice accounts for lack of awareness regarding the problem of compelled testimony, since rarely does the victim protest beyond the counseling session. *Id.*

90. “How can an imprisoned [victim] distinguish the court system from her abusive ex-boyfriend, both of whom claim control of her life against her will?” *Id.* However, some commentators have pointed to the economic, not just the theoretical, burden on the state as a result of domestic violence issues. Rold, *supra* note 86, at 249 (noting that domestic violence “places great stress” on police departments, courts, medical personnel, mental health providers, social service providers, children, and employers, so prosecution and prevention is a high priority).

multiple scenarios in which an alleged victim called upon to testify against a family member may not be in such a position of helplessness.⁹¹

2. Crimes Committed by Non-family Members

No court has held that a victim of a crime committed by a non-family member has a *right* to refuse to testify. Nevertheless, some courts have provided special rules for rape victims and child victims, and will often exercise discretion to allow alternative methods for these victims' allegations and statements to come before the decision-maker.⁹² The San Diego Police Department sums up the reasoning for compelled testimony by stating that, "[i]ndividuals who are crime victims or witnesses have a civic duty to testify in court to help convict and punish criminals. This is an essential element in our criminal justice system. Criminals cannot be prosecuted if community members fail to fulfill this responsibility."⁹³ This explanation relies on the theory that the purpose of the criminal justice system is primarily to uphold the laws, and to serve the interests of individual victims secondarily, or not at all. A more

91. The case that provides the backdrop for this Note is an excellent example of this. In that case, three factors distinguished it from a typical domestic violence situation where the batterer and victim continue to live in the same household. First, when the women were allegedly victimized, they did not live with their grandfather, the alleged abuser, but rather the prosecution alleged that they were abused during a visit. Second, when charges were brought, the women no longer lived in a home where their grandfather had access. Along the same lines, the women were adults with their own households and families at the time of their decision not to testify. See *supra* note 1. These factors play an important role in determining whether an alleged victim should be forced to testify against a family member.

92. See, e.g., *supra* notes 76–78 and accompanying text (regarding rape shield laws). See also Carol Schultz Vento, Annotation, *Validity, Construction, and Application of Child Hearsay Statutes*, 71 A.L.R. 5th 637 (1999) (discussing rules to allow admission of child hearsay statements into evidence to prevent further trauma to the child). These special rules can, however, create other constitutional difficulties, such as Confrontation Clause issues. See *supra* note 23.

93. City of San Diego, *Helping to Convict and Punish Criminals*, <http://www.sandiego.gov/police/prevention/convict.shtml> (last visited Feb. 16, 2007). See also Genesee County Prosecutor's Office, *Your Obligations and Responsibilities to Our Community as a Victim of Crime*, <http://www.co.genesee.mi.us/Prosecutors/ CVS.htm> (last visited Feb. 16, 2007) ("As a victim of crime, your help is very important to our system of justice. When victims report a crime and testify, they help to make the community a safer place to live.").

realistic (and humane) approach recognizes that the justice system is designed to do both.

3. Intra-family Testimonial Privilege

A very small number of decisions have recognized some form of intra-family, non-spousal, testimonial privilege.⁹⁴ Such decisions have identified three potential harms if a family member is compelled to testify against another in a criminal proceeding. The first harm is the mental, physical, and emotional damage done to the individual refusing to testify, which results from the disavowal of the emotional debt family members owe one another.⁹⁵ The second harm is the permanently detrimental effect to the family from such coercion.⁹⁶ The third harm is the damage to society as a whole from state intrusion into the family unit.⁹⁷ Missouri has refused to recognize a parent-child testimonial privilege, reasoning that such a privilege should be created by the legislature, not the courts.⁹⁸

94. See *State v. Willoughby*, 532 A.2d 1020, 1021 (Me. 1987) (finding that neither the United States nor Maine constitutions recognize a privilege not to testify in court about communications between a child and parents or between siblings, and therefore, there is no intrafamily testimonial privilege). In *Willoughby*, the court pointed to the paucity of authority on the subject, but noted that only one federal court and some lower New York state courts have recognized an intrafamily testimonial privilege. *Id.* at 1022. The federal court was the District of Nevada. *In re Agosto*, 553 F. Supp. 1298 (D. Nev. 1983). See also Kelly Korell, Annotation, *Testimonial Privilege for Confidential Communications Between Relatives Other than Husband and Wife—State Cases*, 62 A.L.R. 5th 629 (1998) (“Most courts . . . have been unwilling to extend the rationale underlying the marital privilege to protect confidential communications between parents and children or other family members.”).

95. See *In re Agosto*, 553 F. Supp. at 1300. The movant argued that as a child of his father, he was and will always remain emotionally indebted to his father as long as he lives, and untold suffering would result to him and his family unit if he were required to betray that debt. *Id.*

96. See *id.* at 1301–02. The movant urged that the family unit is considered inviolable in Western society, and that history and philosophy illustrate the importance of its sanctity and harmony. *Id.* Additionally, the movant argued that the parent-child or blood relationship is even more worthy of protection than a spousal bond, since spousal relationship is voluntary and capable of dissolution, whereas a parent-child relationship is lifelong and unbreakable. *Id.*

97. See *id.* at 1302. The movant argued that the breakdown of a family unit is a societal problem, and that open communication would protect the unit, and lead to better-adjusted children and families, and in turn improve modern society. *Id.*

98. *State v. Bruce*, 655 S.W.2d 66, 68 (Mo. Ct. App. 1983).

B. Proposal

The tension among victims' rights, victims' safety, state interests, and the limits of the law precludes an easy answer to the question of whether alleged victims should have the right to refuse to testify against a family member accused of harming them. Ultimately, this question cannot be resolved with a simple "yes" or "no" answer. Rather, the courts should acknowledge and address the issue head-on, by taking into account multiple factors at two important stages. The first stage is at the time the prosecution first attempts to compel testimony from the unwilling alleged victim, whether by certifying the alleged victim as a witness or by applying for an immunity order so that the victim has no exception to claim for not testifying. The second stage is if and when the alleged victim refuses to take the stand or takes the stand and refuses to testify. This multi-factor process can account for the difficulties and nuances of the problem, and it is consistent with the privacy jurisprudence described above.

When an alleged victim refuses to testify against a family member, the court should take into account the following factors: what the alleged victim says she or he wants and why; whether the alleged victim is dependent upon or subject to the control of the alleged abuser;⁹⁹ whether other potential victims are dependent upon or subject to the control of the alleged abuser;¹⁰⁰ the age of the alleged victim; the emotional and mental competence of the victim; any criminal history of the alleged abuser; how the alleged victim and alleged abuser are related;¹⁰¹ the religious beliefs of the alleged

99. This could include whether they live in same house, are financially dependent, or if the alleged abuser holds a position of authority.

100. Even if the alleged victim is now safely out of the home, for instance, whether younger siblings or other vulnerable people are still in potential harm's way could be considered.

101. This could include whether the alleged victim and alleged abuser are immediate versus distant relatives, or blood or step relations. The importance of protecting the family unit could arguably be more compelling for immediate family, or for blood relations, but there is authority which challenges this notion. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494, 503–04 (1977) (holding that in the housing ordinance context, constitutional protection of the sanctity of family extended to grandsons, not confined within arbitrary boundary drawn at limits of nuclear family); *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977) (noting the importance of family relationships, not dependent on blood relationships, to the individuals involved and to society).

victim;¹⁰² the circumstances under which the alleged abuse was reported;¹⁰³ and finally, any other evidence which might tend to indicate the potential for coercion from any source. These factors allow the judge to gauge the potential for overt or insidious coercion.

As has been elaborated above, a victim should not be or feel re-victimized by the judicial system; being imprisoned for making a choice about how to deal with events occurring in one's own life may do just that. On the other hand, the judicial system is designed to protect victims who may not be able to make an informed choice, as well as society as a whole. It is unquestionable that when a victim refuses to testify out of fear for his or her own safety and well-being, society needs to intervene, possibly by compelling testimony.¹⁰⁴ The more difficult situation arises when a victim's refusal to testify is the result of a considered decision, such as forgiveness, the desire for family unity, the desire to move on with one's life and not relive

102. In the case *In re Agosto*, the movant claimed a parent-child privilege partly on the basis of the First Amendment's guarantee of freedom of religion. 553 F. Supp. 1298, 1300-01 (D. Nev. 1983). He argued that he was bound by the Judeo-Christian fifth commandment to "honor thy father and mother," and hence the government could not force him to testify against his father without violating the First Amendment. *Id.*

103. This is a difficult factor for a couple of reasons. First, whether the alleged victim reported the crime raises questions about whether, once reporting a crime, one has a duty to aid investigation and prosecution of it. On one hand, it is the reporter who has directly caused such investigation and prosecution, and in that sense, perhaps there is a measure of responsibility associated with the engagement of others. On the other hand, it would surely be bad policy to send the message that victims should forego reporting crimes and seeking help out of fear that doing so would permanently destroy any claim of privacy. Second, confrontation issues may arise. If an alleged victim is unconditionally allowed to report a crime (presumably giving some sort of statement, whether written or oral, to law enforcement or others) but not testify about it, the accused would have no opportunity to cross-examine his or her accuser, which may violate the accused's Sixth Amendment rights. *See supra* note 23. Further exacerbating the problem, fear about false accusations is not entirely unfounded, making this Sixth Amendment deprivation even more serious in some situations.

104. This is a result of the above-discussed theory that victims are safer when they are compelled to testify than when it appears they are directly participating in the prosecution of their abuser. Rold, *supra* note 86, at 253 ("Incidents of further violence decrease when the spouse is compelled to testify.") (citing Angela Corsilles, *No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?*, 63 FORDHAM L. REV. 853, 877 (1994)). One limitation to this theory is the extent to which abusers actually ponder the source of their problems rather than simply striking out at a vulnerable target, namely, the victim. This "rational choice" theory has been supported by various authorities, but like most theories, it probably does not play out in every case. *See Corsilles, supra*, at 874. Regardless, in no circumstances should an alleged victim be *jailed* merely for refusing to testify.

negative past experiences, and other similar reasons.¹⁰⁵ In that case, the state still has an interest in upholding the law and prosecuting crimes, but it is urged here that such lofty goals do not outweigh the rights of the victim to control his or her own life decisions. Abuse at the hands of a family member is in many ways one of the most invasive crimes.¹⁰⁶ A decision made absent coercion or fear regarding such an invasion should not be disregarded lightly.

CONCLUSION

The Ninth Amendment involves making choices about how to direct one's life free of governmental interference.¹⁰⁷ Those scholars who dismiss the Ninth Amendment as a legitimate basis for protecting rights not expressly enumerated elsewhere in the Constitution have forgotten the warning that "[i]t cannot be presumed that any clause in the [C]onstitution is intended to be without effect."¹⁰⁸ Countervailing considerations, such as those described above, demonstrate that an absolute right of an alleged victim to refuse to testify against a family member can do more harm than good, both to society at large and to the victims themselves. However, alleged victims should have the ability to make considered decisions regarding the prosecution of their alleged abusers, and such an ability most naturally flows from a right to privacy. The Ninth Amendment provides a basis for this privacy right, and constitutional scholarship should not overlook this basis without careful consideration.

105. An interesting question raised by this hypothetical is whether this Note and other articles advocating expansion of the Ninth Amendment's protections would be more or less successful if the right protected by the Ninth Amendment was articulated as "personal autonomy" rather than "privacy."

106. See, e.g., Rape, Abuse, & Incest National Network, <http://www.rainn.org/types-of-assault/sexual-assault/incest.html> (last visited Jan. 24, 2007) ("Incest is considered by many experts to be a particularly damaging form of sexual abuse because it is perpetrated by individuals whom the victim trusts and depends upon.").

107. The right to privacy is a fundamental personal right that is "protected from abridgment by the Government though not specifically mentioned in the Constitution." *Griswold v. Connecticut*, 381 U.S. 479, 495–96 (1965) (Goldberg, J., concurring).

108. *Griswold*, 381 U.S. at 490–91 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803)).

In Missouri, many factors compel the conclusion that some protections for victims beyond those currently offered should be provided.¹⁰⁹ The multi-factor approach described in this Note is one way to balance policy considerations with an important constitutional right.

109. Namely, the inadequate victims' rights provisions, *supra* notes 17–18 and accompanying text; the dilemma posed by the witness immunity laws, *supra* notes 20, 21–22 and accompanying text; and the fact that two adult women were jailed for refusing to testify about alleged events that allegedly happened when they were children, *supra* note 1 and accompanying text.